STATE OF MICHIGAN

COURT OF APPEALS

CLARE MORTON,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

UNPUBLISHED
April 19, 2002

No. 227875
Genesee Circuit Court
LC No. 98-063892-CL

Before: Jansen, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant General Motors Corporation under MCR 2.116(C)(10) in this case alleging age discrimination. We affirm.

Plaintiff began working for defendant on June 14, 1976, as an hourly employee in the city of Flint. A few months later, in September of 1976, plaintiff was promoted to manufacturing supervisor, a salaried position. By 1991, plaintiff was working as an aftermarket customer service representative in the service department. According to plaintiff, in late 1995, plaintiff's manager Joe Cassasa told plaintiff that he would be getting a new supervisor and that he and Cassasa were on a list of 75 to 100 employees created by Kay Bustard that Bustard wanted out of the plant. Cassasa also told plaintiff that most of those on the list were "of seniority to be retired," or "gray haired, of older seniority and most were in retirement age."

In 1996, there were three separate service departments, located in Flint, Michigan; Rochester, New York; and Anderson, Indiana. In early 1996, defendant sought to consolidate the service departments, which resulted in plaintiff's duties being transferred to the aftermarket engineering group in Flint. Defendant informed plaintiff of his reassignment in April of 1996. At that time, plaintiff was advised that his duties might be eliminated or transferred, and plaintiff was given three options: (1) take an early retirement or career transition; (2) find another salaried position; or (3) return to hourly employment. Defendant further maintains that it advised plaintiff to utilize career counseling that Delphi Automotive Systems was offering, although plaintiff contends that he was not offered these career consulting services. In November 1996, Dave Harvoth, the divisional service manager in Flint, reassigned plaintiff because plaintiff lacked a college degree and because of his skill level. Plaintiff, however, did not seek further education because he was planning to retire in seven years.

In April of 1997, Michael Sweeney, the manager of Human Resource Management, told plaintiff that he was eligible to return to the hourly workforce, although Sweeney claimed that efforts were made to find other salaried positions for plaintiff. However, in August of 1997, plaintiff was demoted and returned to the hourly workforce. Plaintiff's salaried position in the service department was ultimately eliminated, with some of plaintiff's former duties distributed among the existing employees in the service department and some responsibilities transferred to another group. In September 1998, plaintiff filed suit against defendant, alleging, among other things, a claim of age discrimination in violation of the Civil Rights Act, MCL 37.2202.

Defendant moved for summary disposition, which the trial court granted. The trial court ruled, with respect to the age discrimination claim, that plaintiff failed to establish that he was treated differently than a similarly situated younger employee. The trial court further noted that plaintiff was not similarly situated with Chris Lubiato, an employee of H. E. Services, who worked on a contractual basis with Delphi and took over many, although not all, of plaintiff's former duties.

On appeal, plaintiff contends that the trial court erred in granting defendant's motion for summary disposition. We review do novo the trial court's ruling on the motion for summary disposition under MCR 2.116(C)(10), which tests the factual support of plaintiff's claim. *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 537; 620 NW2d 836 (2001).

In this case, we apply the burden-shifting approach set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), because there is no direct evidence of age discrimination. First, plaintiff must establish a prima facie case of age discrimination, which requires proof by a preponderance of the evidence that: (1) plaintiff was a member of the protected class; (2) plaintiff suffered an adverse employment action; (3) plaintiff was qualified for the position; and (4) plaintiff was replaced by a younger person. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 177; 597 NW2d 906 (1998).

Once the plaintiff has established a prima facie case, a presumption of discrimination arises and the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* at 173. The defendant must set forth admissible evidence of its reason to demote the plaintiff. *Id.* at 174. Once the defendant produces such evidence, the presumption of discrimination dissipates and the burden of proof shifts back to the plaintiff. *Id.* Plaintiff then must show through admissible evidence that the employer's proffered reason was a mere pretext for discrimination. *Id.*

At this juncture, we note that the parties and the trial court have somewhat conflated the shifting burdens of proof. In *Lytle*, *supra* at 177, the Court, after noting the elements of a prima facie case, stated that the parties did not contest that the plaintiff had established a prima facie case. The employer effectively rebutted the presumption of discrimination by advancing a bona fide reduction-in-force defense. The Court then held that "[t]o prove that the [reduction in force] was a mere pretext and that age was a determining factor [in the decision to discharge the plaintiff], plaintiff had to show that she was treated differently from similarly situated employees." *Id.* at 178. Thus, for the trial court to rule that plaintiff failed to show that he was treated differently from similarly situated younger employees, it implicitly found that plaintiff had established a prima facie case.

Part of the difficulty in this case stems from the fact that plaintiff's position was eliminated as part of a restructuring. On this note, the United State Court of Appeals for the Sixth Circuit has explained with regard to a prima facie case:

> It is important to clarify what constitutes a true work force reduction case. A work force reduction situation occurs when business considerations cause an employer to eliminate one or more positions within the company. An employee is not eliminated as part of a work force reduction when he or she is replaced after his or her discharge. However, a person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work. A person is replaced only when another employee is hired or reassigned to perform the plaintiff's duties. . . .
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> . . . If the plaintiff was truly singled out for discharge because of age he or she should be able to develop enough evidence through the discovery process or otherwise to establish a prima facie case. For example, a plaintiff could establish that he or she possessed qualifications superior to those of a younger co-worker working in the same position as the plaintiff. Alternatively, a plaintiff could show that the employer made statements indicative of a discriminatory motive. . . . The guiding principle is that the evidence must be sufficiently probative to allow a factfinder to believe that the employer intentionally discriminated against the plaintiff because of age. [*Barnes v Gencorp, Inc*, 896 F2d 1457, 1465-1466 (CA 6, 1990).]

In this case, there is no dispute that plaintiff has satisfied the first two elements of a prima facie case. Plaintiff was 49 years old when he was demoted in 1997 to an hourly position. Defendant attacks the third and fourth elements, and the trial court ruled that plaintiff failed to present evidence that he was treated differently than a similarly situated younger employee. We find, however, that plaintiff was qualified for the position he held as an aftermarket service representative because he held that position for six years and received favorable employment reviews.

Additionally, the issue whether plaintiff was replaced by a younger employee is not really applicable here because, as we have stated, the position was eliminated and plaintiff's job duties were distributed to a number of other employees is other departments. Thus, while plaintiff cannot prove that he was replaced by a younger employee, he still has the opportunity to show that defendant intentionally discriminated against him because of his age. *Id.* at 1466.

We find that plaintiff simply has not presented evidence that he was singled out for demotion because of his age. There is no evidence that Harvoth, who made the ultimate decision about plaintiff's demotion, acted in a discriminatory manner. Here, we note that the handwritten notes of Harvoth relating to plaintiff say nothing about age, much less a discriminatory animus. Further, plaintiff has presented no statistical evidence of discrimination. As the trial court correctly held, plaintiff has presented no evidence that he was treated differently than a similarly situated younger employee. In this regard, the fact that Lubiato, a younger employee, assumed many of plaintiff's former duties is not dispositive. Lubiato was an employee of H. E. Services who worked for defendant on a contractual basis. Lubiato had a college degree and computer

skills, unlike plaintiff, and assumed some, but not all of plaintiff's duties. Plaintiff's duties were dispersed among several employees as his position was actually eliminated.

Because plaintiff has not come forward with evidence that he was treated differently from similarly situated employees, *Lytle, supra* at 178, or any other evidence that defendant intentionally discriminated against him because of his age, *Barnes, supra* at 1466, the trial court did not err in granting summary disposition in favor of defendant.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Richard Allen Griffin